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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT SALDANA,

Defendant and Appellant.

B223950

(Los Angeles County
Super. Ct. No. BA209187)

APPEAL from an order of the Superior Court of Los Angeles County,
David Wesley, Judge. Appeal dismissed; remanded with directions.

Gilbert Saldana, in pro. per.; Jill Ishida, under appointment by the Court of
Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Gilbert Saldana appeals from an order after judgment denying his motion to modify the restitution fine imposed as part of his sentence (Pen. Code, § 1202.4, subd. (b)).¹ We dismiss the appeal.

PROCEDURAL BACKGROUND

Saldana was charged by information in 2002 with one count of first degree murder (§ 187), one count of attempted willful, deliberate and premeditated murder (§§ 187, 664), a second count of attempted murder (not premeditated) and one count of robbery (§ 211). It was alleged as a special circumstance to the first degree murder charge that Saldana had intentionally killed the victim while Saldana was an active participant in a criminal street gang and the murder was carried out to further the activities of the gang. (§ 190.2, subd. (a)(22).) As to all four counts the information specially alleged firearm-use enhancements under section 12022.53 and a criminal-street-gang enhancement under section 186.22, subdivision (b).

On October 8, 2003 the jury convicted Saldana on all charges and found true the special circumstance, criminal-street-gang and firearm-use enhancements.

On January 9, 2004 the trial court sentenced Saldana to life without the possibility of parole for the special circumstance murder plus 25 years to life for the firearm-use enhancement; a consecutive indeterminate term of life for the attempted premeditated murder plus 25 years to life for the firearm-use enhancement; a consecutive determinate term of nine years for the second attempted murder (nonpremeditated) count plus 10 years for the criminal street gang enhancement; and a further consecutive determinate term with firearm-use and criminal-street-gang enhancements for robbery. Saldana received presentence custody credits of 794 actual days. The court ordered Saldana to pay a \$8,800 restitution fine (§ 1202.4, subd. (b)) and imposed and suspended a \$8,800 parole revocation fine (§ 1202.45).

¹ Statutory references are to the Penal Code.

On February 4, 2010 Saldana filed a motion for modification of sentence, purportedly pursuant to Penal Code section 1260, in which he sought to have the order requiring him to pay a \$8,800 restitution fine revoked or reversed because he was sentenced to life without the possibility of parole on the first-degree special circumstance murder count. In a written order filed February 26, 2010 the trial court denied Saldana's motion with respect to the restitution fine, but ruled the order imposing and suspending the \$8,800 parole revocation fine should be reversed under *People v. Oganessian* (1999) 70 Cal.App.4th 1178.

On March 29, 2010 Saldana filed a notice of appeal from the February 26, 2010 order. We appointed counsel to represent him on appeal.

After examination of the record counsel filed an opening brief in which no issues were raised. On August 6, 2010 we advised Saldana he had 30 days within which to personally submit any contentions or issues he wished us to consider. On August 23, 2010 we have received a hand-printed supplemental brief in which Saldana essentially repeats the single argument presented to the trial court, that is, that no restitution fine is properly imposed on a defendant sentenced to life without the possibility of parole.

We have examined the entire record and are satisfied Saldana's attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436, 441.)² Moreover, Saldana's motion—filed more than six years after his sentence was imposed—was not properly before the trial court in the first instance and should have been dismissed for

² Because Saldana was sentenced to two determinate terms (for attempted murder and robbery) in addition to life without the possibility of parole for first degree murder with a special circumstance, both the restitution fine and the suspended parole revocation fine were mandatory. (See *People v. Brasure* (2008) 42 Cal.4th 1075.) As the Supreme Court explained in *Brasure*, the analysis in *People v. Oganessian, supra*, 70 Cal.App.4th 1178, relied upon by Saldana—and by the trial court with respect to the parole revocation fine—does not apply when the defendant is sentenced to at least one determinate term in addition to life without the possibility of parole and other indeterminate sentences.

lack of jurisdiction. (See § 1170, subd. (d) [sentence must be recalled within 120 days of defendant's date of prison commitment]; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725 [court lacked jurisdiction to modify defendant's sentence after the 120-day limitation in § 1170, subd. (d) had expired].)

Section 1260, upon which Saldana purported to rely to establish the court's jurisdiction to consider his motion, does not authorize a motion to modify a felony sentence in the trial court. The statute simply describes the potential rulings an appellate court may make on appeal.³

Because the trial court lacked jurisdiction to consider Saldana's motion to modify his sentence, the order denying the motion is not appealable. (*People v. Chlad, supra*, 6 Cal.App.4th at p. 1725 ["[h]aving concluded the trial court was without jurisdiction to resentence Chlad, we now determine the April 12 order denying Chlad's motion to modify his sentence is not an appealable order"]; see *People v. Bruschel* (1982) 132 Cal.App.3d 667, 668-669.) The appeal must be dismissed.

DISPOSITION

The order of the trial court granting in part Saldana's motion for modification of his sentence and reversing the order imposing the parole revocation fine is vacated. The matter is remanded to the trial court to reinstate the January 9, 2004 order imposing and suspending a \$8,800 revocation fine under section 1202.45, and to dismiss the motion for lack of jurisdiction.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.

³ Section 1260 provides: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modifying any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."